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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BERT JUAREZ, Defendant and Appellant.	B217160 (Los Angeles County Super. Ct. No. LA058499)

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene Schempp, Judge. Affirmed as modified.

Randy S. Kravis for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan S. Pithey and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Bert Juarez appeals from the judgment entered following a jury trial that resulted in his conviction of the attempted premeditated murder of Lily M.; assault with a firearm; and possession of a firearm by a felon.[1] He contends: (1) the trial court had a sua sponte duty to instruct on the lesser included offense of attempted voluntary manslaughter; (2) it was error to give CALJIC No. 1.22; (3) the trial court had a sua sponte duty to instruct the jury to view defendant's out-of-court statements with caution; (4) consecutive sentences for attempted murder and possession of a firearm were precluded by Penal Code section 654.[2] Defendant also contends, and the People concede, that the trial court miscalculated defendant's presentence custody credits by one day. We modify the judgment to reflect the correct number of presentence custody credits and affirm as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358), the evidence established that in March 2008, defendant lived with Lily and their two-year-old daughter (the child) on Hortense Street in North Hollywood. At about 10:30 a.m. on March 21, 2008, neighbor William Stearns went outside to investigate a noise that had awakened him. Stearns saw defendant standing in the driveway of the house next door to defendant's house. When Stearns asked defendant if he heard anything, defendant said something about "firecrackers." Another neighbor, Raymond Seager, also heard a noise that morning which he recognized as gunshots. When Seager walked down the street to investigate, he saw Lily huddled on the ground

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1 The jury also found true various gun use and great bodily injury enhancements. Defendant was sentenced to a total of 25 years 8 months to life in prison comprised of 25 years to life for attempted murder pursuant to Penal Code section 12022.53, subdivision (d); plus a consecutive 8 months (one-third the 24-month midterm) for being a felon in possession of a firearm; sentence on the assault with a firearm conviction was imposed but stayed pursuant to Penal Code section 654. He filed a timely notice of appeal.

2 All future undesignated statutory references are to the Penal Code.

inside an iron fence a few houses down the street; she was sobbing and holding her foot which was bleeding from what Seager recognized as a gunshot wound. Seager saw a bullet casing on the ground near where Lily was sitting, but did not see a weapon. When Seager's house guest, Torgenson, arrived a few moments later, he called 911. While Torgenson was still on the phone with the paramedics and Seager was trying to aid Lily, defendant approached carrying the child. Defendant did not ask what happened, or if Lily was okay.

That morning, Captain Alfred Poirier of the Los Angeles Fire Department responded to a call about a "self-inflicted gunshot wound." At the location, Poirier saw Lily was on the ground at the bottom of some stone stairs leading to the front door of a residence; she had a gunshot wound to her foot. Defendant was standing nearby holding the child. Although Lily told Poirier that she shot herself accidentally, this was inconsistent with Poirier's observation that the entrance wound was on the back of Lily's foot and the exit wound was on the side, indicating to Poirier that she had been shot from behind. Poirier noticed a blood smear on the marble landing, a ricochet mark next to the blood smear and a small hole in the bottom of the doorjamb in a direct line with the ricochet mark; he found a bullet casing nearby. In response to Poirier's inquiry, Lily and defendant both said they did not know where the gun was; it was later found in the waistband of defendant's pants. But even before that, Poirier was dubious of the story defendant and Lily were telling. Based on his observations, including the missing gun and defendant's baggy clothing, Poirier directed two firefighters to keep defendant from leaving the scene and from accessing anything in his pockets or waistband. When a firefighter stopped defendant from getting into the ambulance with Lily, defendant became confrontational. He said, "Fuck you," to the firefighter. And when the firefighter tried to move defendant away from the ambulance, defendant said, "Get your fucking hands off me."

When Los Angeles Police Officer Maria Davalos accompanied Lily and the child in the ambulance to the hospital, Davalos already knew that a gun had been found on defendant's person and he was in custody. During the ride, Davalos respected what she

perceived as Lily's desire not to talk about the matter in front of the child. But at the hospital, Davalos's partner took the child to another room while Davalos remained with Lily. After Lily's wound was treated, Davalos asked her again what happened. Lily reluctantly told Davalos that, during an argument, defendant got a gun and shot her as she was running away. Lily also told an emergency room nurse that she was shot in the foot as she was running away from her boyfriend.

Meanwhile, police investigating the incident retrieved the shell casing found on the walkway near where Lily had been sitting, as well as two expended shell casings in the driveway of defendant's house. A criminalist determined that the gun recovered from defendant was the weapon that fired these three bullet casings. This weapon has certain safety features that prevent it from firing accidentally.

The defense presented evidence of defendant's good character including the testimony of his ex-girlfriend and the mother of his son, a friend and business associate, and Lily's mother.

DISCUSSION

A. *Instruction on Lesser Included Offense of Attempted Voluntary Manslaughter*

Defendant contends the trial court erred in refusing to instruct on attempted voluntary manslaughter as a lesser included offense of attempted premeditated murder. He argues that evidence of Lily's statement to Davalos that the shooting was prompted by an argument between defendant and Lily during which defendant called Lily a "brat" and Lily accused appellant of hiding behind their daughter, supported giving the instruction. We disagree.

Trial courts must generally instruct the jury on lesser included offenses whenever the evidence warrants it. (*People v. Horning* (2004) 34 Cal.4th 871, 904-905.) Attempted voluntary manslaughter is a lesser included offense of attempted murder. (See *People v. Montes* (2003) 112 Cal.App.4th 1543, 1545.) When the defendant acts "upon a

sudden quarrel or heat of passion" (§ 192, subd. (a)), the defendant is deemed to have acted without malice, even if he or she intended to kill. (See *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.)

The heat of passion requirement for attempted manslaughter has both an objective and a subjective component. Subjectively, the defendant must actually attempt to kill under the heat of passion. Objectively, the passion must be such as would " 'naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.) Although no specific type of provocation is required (*People v. Berry* (1976) 18 Cal.3d 509, 515), it must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim (*People v. Lee* (1999) 20 Cal.4th 47, 59).

Here, neither Lily nor defendant testified. The only evidence of the circumstances of the shooting was Lily's statements. Officer Davalos testified that when she questioned Lily at the hospital, Lily said that, when defendant ran into another room during an argument, Lily "knew he was going to get the gun, so she grabbed her daughter and she ran out of the house. Once she had reached the gate, she turned around and saw him with the gun in his right hand. So she managed to open the gate, and he put the gun on his back. So once he was outside and she was outside, too, she – she actually gave him their daughter, and she stated because she wanted him to calm down." Lily asked defendant "why he was doing this, and he said that she was a spoiled brat." Then Lily "told him, why was he hiding behind their daughter. And that's when he took the daughter, took like 10 or 12 steps, and put her down, and then he reached for the gun, and she started running . . . . And then she heard three to four shots, and she ran into a neighbor's house. She said once she had reached the stairs of the neighbor, she felt like a burning sensation on her leg or her foot. That's when she knew she had got shot."

Contrary to defendant's argument, no rational juror would believe that these facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1252-1253.) Thus, there was no evidence to support instructions on attempted voluntary manslaughter as a lesser included offense of attempted premeditated murder and the trial court did not err in refusing to give such instructions.

B. *CALJIC No. 1.22*

Defendant contends the trial court erred in giving CALJIC No. 1.22, which defines malice in contexts other than murder and attempted murder, and defense counsel was ineffective in failing to alert the trial court to the error. He argues that, although the trial court properly gave CALJIC No. 8.66, the error in also giving CALJIC No. 1.22 was prejudicial because the trial court did not make other consistent references to the requisite mental state for attempted murder, defense counsel's closing argument did not focus on the issue and the evidence of malice was not overwhelming. We disagree.

Section 7, subdivision (4) provides: "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act." This definition is embodied in CALJIC No. 1.22. Various crimes that include malice as an element, such as mayhem and arson, for example, incorporate the section 7, subdivision (4) definition of malice. (See, e.g., § 203 ["Every person who unlawfully and maliciously deprives a human being of a member of his body . . . is guilty of mayhem"]; § 451 ["A person is guilty of arson when he or she willfully and maliciously sets fire . . . ."].) With the exception of murder, when malice is an element of the charged offense, CALJIC No. 1.22 is properly given.

When the charged offense is murder or attempted murder, however, the word "malice" means something more than the definition set forth in section 7, subdivision (4). (*People v. Gorshen* (1959) 51 Cal.2d 716, 730-731, overruled on another point *People v. Lasko* (2007) 23 Cal.4th 101, 110.) In the context of murder and attempted murder,

section 188 defines express malice as "a deliberate intention unlawfully to take away the life of a fellow creature." When it is shown that the killing or attempted killing resulted from the intentional doing of an act with express malice, no other mental state need be shown to establish malice aforethought. (§ 188.) This definition of malice is embodied in CALJIC No. 8.66, which, as given, reads: "The defendant is accused in count 1 of having committed the crime of attempted murder, in violation of section[s] 664 and 187 . . . . Every person who attempts to murder another human being is guilty of a violation of . . . section[s] 664 and 187. [¶] Murder is the unlawful killing of a human being with malice aforethought. In order to prove attempted murder, each of the following elements must be proved: [¶] [1. A] direct but ineffectual act was done by one person towards killing another human being; and, [¶] [2. *T*]*he person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being.* In deciding whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed on the other. [¶] Mere preparation, which may consist of planning the killing or of devising, obtaining, or arranging the means for its commission is not sufficient to constitute an attempt. However, acts of a person who intend[s] to kill another person will constitute an attempt . . . where those acts clearly indicate a certain unambiguous intent to kill. [¶] The acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstance not attendant in the original design." (Italics added.) Consistent with CALJIC No. 8.66, the prosecutor argued to the jury: "[I]n an attempted murder, the way that you have malice aforethought is specific intent to kill, okay? So if you find when he shot her he had intent to kill her, then that's attempted murder, okay? . . . [¶] . . . So you have to find[] two things. He shot her and, secondly, he had the intent to kill. If you find those things, then it's attempted murder."

As the Use Note to CALJIC No. 1.22 states, that instruction should not be given as a definition of malice aforethought in a murder trial. (*People v. Chavez* (1951) 37 Cal.2d 656, 666-667.) However, courts have consistently found that when both CALJIC

Nos. 1.22 and 8.66 are given, the error in giving CALJIC No. 1.22 is harmless. (*People v. Chavez, supra*, at p. 666; *People v. Shade* (1986) 185 Cal.App.3d 711, 715; *People v. Harris* (1985) 175 Cal.App.3d 944, 956.)

Here, both instructions were given. We agree with the reasoning of the other courts that have considered this issue and conclude the error in giving CALJIC No. 1.22 was harmless.

C. *Cautionary Instruction*

Defendant contends the trial court prejudicially erred in failing to sua sponte instruct the jury to view the evidence of defendant's out-of-court statements with caution.[3] He argues instruction was necessitated by the evidence that: (1) when a neighbor investigating the sound of gunshots asked defendant if he heard anything, defendant mentioned "fireworks;" (2) later defendant told Poirier he did not know where the gun was; and (3) defendant said, "Get your fucking hands off me," when a fireman prevented him from getting into the ambulance with Lily. The People counter that defendant was not entitled to the instruction because the statements were not "admissions." We find any error harmless.

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3 Defendant frames the issue as a failure to give CALJIC No. 2.71.7 ("Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant *before the offense* with which [he] [she] is charged was committed. [¶] It is for you to decide whether the statement was made by [a] [the] defendant. [¶] Evidence of an oral statement ought to be viewed with caution."). (Italics added.) The three statements he argues warranted the instruction were all made *after* the offense occurred. Under these circumstances, the issue is whether the trial court had a duty to give CALJIC No. 2.71, which reads: "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]" We treat this as defendant's contention.

When warranted by the evidence, the trial court has a sua sponte duty to instruct the jury to view evidence of a defendant's oral admissions with caution. (*People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Carpenter* (1997) 15 Cal.4th 312, 393; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224.) The purpose of the instruction is to assist the jury in determining whether the statement was in fact made. (*Dickey*, *supra*, at p. 905; *Carpenter*, *supra*, at p. 393; *People v. Beagle* (1972) 6 Cal.3d 441, 456.) A statement need not be explicitly incriminatory to constitute an admission. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 93-94, fn. 8.) " 'Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]' [Citation.]" (*Dickey*, *supra*, at p. 905.) The omission is not prejudicial " 'if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error.' [Citation.]" (*Bunyard*, *supra*, at p. 1224.)

Here, assuming one or more of defendant's statements constituted admissions, the failure to give a cautionary instruction was patently harmless. Although CALJIC No. 2.71 was not given, the jury was given other instructions on how to consider and weigh evidence, including CALJIC No. 2.20 (evaluating witness believability generally); and CALJIC No. 2.27 ("You should give the testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness which you believe is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."). There was no issue of conflicting evidence concerning the precise words defendant used, their meaning or context, or whether they were repeated accurately. Under these circumstances, a more favorable result was not reasonably probable had the trial court given CALJIC No. 2.71.

D. *Section 654*

Defendant contends the trial court erred in not staying the sentence on the possession of a firearm conviction pursuant to section 654. He argues that possession of the firearm was incidental to the attempted murder. We disagree.

Section 654 precludes multiple punishment for conduct that violates more than one criminal statute but which constitutes an indivisible course of conduct. (*People v. Vang* (2010) 184 Cal.App.4th 912, 915.) Whether the provision applies in a given case is a question of fact for the trial court, whose findings will not be reversed on appeal if there is substantial evidence to support them. (*Id*. at pp. 915-916.) Section 654 does not preclude multiple punishments for possession of a firearm and another offense in which the defendant used the firearm where there is evidence that the defendant possessed the firearm before he committed the other offense. In contrast, multiple punishment is improper where the evidence shows that, at most, fortuitous circumstances put the firearm in the defendant's hand at the instant of committing another offense. (*Vang*, *supra*, at pp. 915-916; see also *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413 [§ 654 did not bar multiple punishment where there was evidence that the defendant's possession of the firearm "was not merely simultaneous with the robberies, but continued before, during and after those crimes"].)

Here, there was no evidence that fortuitous circumstances put the gun in defendant's hand at the instant he shot Lily. On the contrary, the evidence established that he retrieved the gun from somewhere in his home and then chased after Lily with the gun in his hand. That the gun was later found in defendant's waistband supports a finding that he also possessed it after the shooting. Under these circumstances, section 654 did not preclude multiple punishment for attempted premeditated murder and possession of a firearm by a felon.

DISPOSITION

The superior court is directed to modify the abstract of judgment to reflect an award of 500 days of presentence custody credits and to forward a copy of the corrected judgment to the Department of Corrections. As modified, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.